

TRAINING MODULE 18

STUDY PLAN

Appellate Processing

Objective:

To learn how to assist a claimant to appeal the denial of a VA benefit, and to become familiar with the procedures for such actions, including submitting appeals to the U.S. Court of Appeals for Veterans Claims.

References:

Title 38, U.S. Code, Chapters 59, 71 and 72.

38 Code of Federal Regulations, Part 3, §§ 3.102–3.105 and § 3.2600; Parts 19 and 20.

Adjudication Manual M21-1MR (Manual Rewrite), Part 1, Chapter 5.

VA Pamphlets: 01-00-1, *Understanding the Appeal Process*;

01-02-02A, *How Do I Appeal?*;

80-06-01, *Federal Benefits for Veterans and Dependents*.

Instructions:

Study the assigned reference materials to learn how to submit a timely and proper Notice of Disagreement and Substantive Appeal, how to advise claimant on the correct procedures, and how to assist with the proper development and presentation of the appeal.

Summary:

ANY UNFAVORABLE ADJUDICATIVE DECISION BY THE DEPARTMENT OF VETERANS Affairs (VA) may be appealed to the Board of Veterans' Appeals, and if the denial continues, to the U.S. Court of Appeals for Veterans' Claims (previously called the Court of Veterans Appeals) and beyond. An adjudicative decision is one which establishes or denies eligibility to a VA benefit, such as service connection for a disability, eligibility for dental treatment, monthly rate of education assistance, waiver of overpayment, etc. A decision that a veteran should be given one type of medical treatment rather than some other is not an *adjudicative* decision, and is not appealable through these channels.

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An appeal is defined as a timely filed written Notice of Disagreement from a VA decision and, after a Statement of the Case has been furnished, a timely filed written Substantive Appeal. A claimant generally has one year from the date of the letter notifying him or her of an adverse decision to submit a Notice of Disagreement; otherwise, that decision becomes final. The only requirements for a Notice of Disagreement are that it must be in writing, it must be addressed to the activity or operating element of VA which made the adverse decision, and it must be worded so it may reasonably be construed as a desire for appellate review. It is not required to say why the claimant is dissatisfied or to make any specific contentions on the Notice of Disagreement (although it is always helpful to do so). If multiple issues were decided and the claimant disagrees with some but not all of the decisions, the Notice of Disagreement should specify which decisions are being contested. If the notice is ambiguous, i.e., does not reasonably indicate a desire to appeal or is not clear which decisions are being disagreed with, the claimant may be asked to clarify. If the claimant does not answer, or can not specify more clearly, the statement may be considered to not be a Notice of Disagreement.

There is a class of decisions which have a shorter appeal period than one year. These are called “simultaneously contested claims,” and involve cases where there are two or more claimants for a single set of benefits; a grant of one claim necessarily means a denial of the other claim or a reduction in benefits for the other claimant. Examples would be two contending claimants, each claiming to be the veteran’s legal surviving spouse; or when there is a claim by a dependent for an apportioned share of the veteran’s (or other beneficiary’s) award, and regardless of the outcome, the unsuccessful claimant contests the decision. In these cases, the unsuccessful claimant must submit a Notice of Disagreement within 60 days from the date of adverse notice; otherwise, that decision becomes final.

For certain Notices of Disagreement the claimant and/or representative may obtain a *de novo* review of the decision by a local Decision Review Officer (DRO) as a first step in the appeal process. This procedure is restricted to those issues governed by 38 CFR, Parts 3 and 4 (primarily Compensation and Pension claims, although issues governed by Part 3 which affect eligibility for other benefits, such as character of discharge, minimum active duty service requirements, recognition of dependents, etc., are also included).

To obtain a DRO review, the claimant and/or representative must request it. If a claimant or representative submits a Notice of Disagreement and does not specify if a DRO review is desired, VA is required to ask the claimant whether he or she wishes such review. The claimant is allowed 60 days to respond. This 60-day period may not be extended. If the claimant or representative does not request DRO review within 60 days after the date VA mails notice of eligibility for such review, the Notice of Disagreement will be processed in the traditional manner, as described below. Only one DRO review is allowed for each issue being contested.

If a DRO review is elected, the DRO will review the claim for correctness and reasonableness. If any additional development is indicated, the DRO will direct that it be done. If the claimant requests it, the DRO may also conduct either a formal hearing or an informal conference on the issue(s). When all development, hearings, etc., are completed, the DRO will then review the claim again, with no deference given to the contested decision. If there is no additional evidence,

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the DRO may modify or reverse an unfavorable decision based on either *de novo* review or on clear and unmistakable error. The DRO may not issue a decision less favorable to the claimant than the original (contested) decision, unless the original decision was clearly erroneous. If the DRO review results in anything less than a full grant of all benefits being sought and the claimant or representative does not withdraw the Notice of Disagreement, the DRO will furnish a Statement of the Case (SOC) and regular appellate processing proceeds, as described below .

For issues not subject to DRO review, or if the claimant does not wish DRO review (or does not answer the letter asking if a DRO review is wanted), when a valid Notice of Disagreement is received the responsible VA activity, called the Agency of Original Jurisdiction (AOJ), is obliged to review the decision for correctness and to determine if any further development is necessary, and if so, to do it. After this review, if the full benefit being sought is still not granted, VA will then furnish a SOC to the claimant and his or her representative (if any). If the disagreement was on a simultaneously contested claim, a copy of the SOC will be furnished to all parties and their representatives (if any). If more than one VA element was involved in the unfavorable decision, the activity which notified the claimant of the decision has primary responsibility for the SOC.

The SOC will contain a recitation of the evidence considered in the decision, a recitation of the laws and regulations applicable to the decision, a statement of the decision, and a discussion of the reasons and bases why the rules as applied to this evidence did not permit the benefit(s) being sought to be granted. The claimant then has 60 days or the remainder of the one-year appeal period, whichever is later, to submit a Substantive Appeal (VA Form 9, *Appeal to the Board of Veterans' Appeals*, or the equivalent written statement) on the issue(s) covered; otherwise, the decision becomes final. **HOWEVER**, *if the appealed issue is a simultaneously contested claim, the appealing party must return the Substantive Appeal within 30 days from the date the Statement of the Case is furnished*; if not, the appeal is not timely perfected and the decision becomes final.

A Supplemental Statement of the Case (SSOC) will be furnished if additional evidence is considered after the original SOC has been sent; if an amended decision has been made granting part but not all of the benefit(s) being sought; or if there was any material defect in the original SOC. The SSOC has the same elements as the original SOC. If the original appeal period had not expired when the additional evidence was considered, the claimant and representative (if any) will be furnished another VA Form 9 and allowed another 60 days (30 days for appeals on simultaneously contested claims) or to the end of the appeal period, whichever is later, for response. If additional issues are raised which were not covered in the original SOC, a new SOC (with another VA Form 9) will be furnished regarding those additional issues. Return of this additional VA Form 9 is subject to the same time limits as the original Substantive Appeal.

In contrast to the Notice of Disagreement, the Substantive Appeal *must* make specific contentions relating to errors of fact or law made by VA in reaching the decision(s) being appealed; however, it does not need to be, and should not be, couched in legalistic jargon or terminology. To the extent feasible, it should relate to specific points in the Statement(s) of the Case. The Board of Veterans' Appeals (BVA) may dismiss any appeal that does not make specific contentions; however, they will construe the record in a liberal manner to determine if this requirement has been met. Once the Substantive Appeal has been returned, the appeal has been "perfected," and the appellant is not required to take any further actions except to cooperate with any additional development as is deemed to be necessary.

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The AOJ will again review the evidentiary record for completeness and to make sure that all due process requirements have been observed. If these reviews result in a SSOC, the appellant and representative (if any) will be given an additional 60 days to make any further response desired. However, once a Substantive Appeal on each issue has been submitted, any further response is optional and is not required to continue the appeal. If there is a representative, the representative will be invited to make a final argument. The AOJ will then certify that the appeal is ready for BVA review, and forward the complete record to them.

The appellant and representative (if any) will be notified when BVA receives the appeal, and will be allowed a period of up to 90 days to submit any additional evidence desired or to request a personal hearing (if not already done), or to request a change in representation. (Note that most veterans' service organizations have strict rules against accepting appointment as representative during an ongoing appeal.)

BVA considers appeals in the order of receipt; however, an appeal may be moved to the head of the pending queue (advanced on the docket) if sufficient cause is shown. "Sufficient cause" would include terminal or serious illness of the appellant; advanced age of the appellant (over age 75); extreme financial hardship on the appellant, etc. Advancement on the docket must be requested in writing by either the appellant or the representative, and must state the reason(s) for the request.

If BVA determines that the appeal is not yet ready for review, they will remand it for additional development, observance of due process requirements, etc., as instructed. Under certain circumstances and depending on the specific evidence required, BVA may accomplish some additional development themselves without remanding the appeal: if BVA determines that the case requires special expertise or involves complex legal issues, they may request an independent (from outside VA) expert medical opinion, or a legal opinion from VA General Counsel. Otherwise, the appeal must generally be remanded. Because of the large number of remanded appeals and the length of time many have been pending because of other workload issues, a separate Appeals Management Center (AMC) has been established for the sole purpose of handling remanded appeals.

When BVA determines that the appeal is ready for review, they will proceed. BVA reviews all appeals under the *de novo* standard. Whether BVA's final decision grants the appeal or affirms the denial, the appellant and representative (if any) will be advised in writing of the decision. The notice will include a listing of the issue(s) considered; findings of fact and law; a recitation of the evidence considered; and the reasons and bases for the decision as to each issue. The decision will also include a notice of appeal rights to the Court of Appeals for Veterans' Claims. This will include instructions on how to file an appeal to the court, where to send it, and the time limit for filing the appeal.

Additional evidence may be submitted by or for the appellant at any point between the time VA first notifies the claimant of its decision and the time BVA notifies the appellant of its decision. ***Remember, however, that submission of additional evidence does NOT extend the time limits for initiating or completing an appeal.*** VA is required by law to review all decisions for correctness and completeness before proceeding with appellate processing when the claimant has disagreed with a decision. It is *always* in the claimant's best interests to word a request for reconsideration as a Notice of Disagreement with intent to appeal if the denial is continued; this will also avoid the problem of an "ambiguous" Notice of Disagreement..

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After the appeal has been forwarded to BVA and the 90-day period has elapsed, any additional evidence submitted may not be reviewed by BVA until it has been first reviewed by the AOJ or AMC, unless the appellant or representative specifically waives such review. The waiver must be in writing and must accompany the evidence being submitted. If no waiver is given, BVA will remand the appeal for review of the additional evidence and preparation of a SSOC if the claim remains denied or if less than all the benefits being sought are granted and the appellant does not withdraw the appeal.

An appellant may request a personal hearing before BVA at any point in the appeal up to the time BVA issues its decision. The hearing may be held before the Board sitting in Washington, DC; before a traveling section of the Board at the VA Regional Office; or by video teleconference, with the claimant at a designated VA station and the Board member in Washington, DC. As described above, the DRO may also conduct a personal hearing for appellants at the Regional Office. Generally, an appellant will only be scheduled once for a hearing on appeal, unless good cause is shown why the hearing should be rescheduled or another hearing is required.

A Notice of Disagreement and a Substantive Appeal may be filed by the claimant or representative, by the claimant's next friend, or, if the claimant is under a disability by a court, by a fiduciary. Even if the claimant is under such disability, VA will still honor and act upon a Notice of Disagreement filed by the claimant if it is otherwise valid.

A Notice of Disagreement may be withdrawn in writing at any time prior to filing the Substantive Appeal, and a Substantive Appeal may be withdrawn in writing at any time before BVA promulgates its decision. Either the claimant or the representative may make the withdrawal. Withdrawal of a Notice of Disagreement or appeal as to any issue(s) does not preclude submitting another Notice of Disagreement on the same issue(s), provided the original time limit to appeal the decision has not expired.

An appellant or representative may request reconsideration of a final BVA decision at any time upon allegation of clear and unmistakable error of fact or law (CUE); discovery of new and material evidence in the form of relevant service records; or allegation of fraud or misrepresentation of evidence which materially influenced the Board's decision. BVA may also on its own initiative (without request from the appellant or representative) reconsider its decision under the same circumstances. However, if an appeal is pending before the CAVC, BVA may not reconsider its decision unless the court gives it specific permission to do so.

An appellant has 120 days from the date of an unfavorable BVA final decision to file an appeal to the U.S. Court of Appeals for Veterans' Claims (CAVC). ***This appeal must be sent directly to the court, NOT to BVA or to any VA office.*** The time limit for filing may not be extended or waived. There is a filing fee, which may be waived. Only the appellant or representative may appeal a BVA decision to the court; the agency may not appeal.

The court may *only* consider the issues, evidence and arguments that BVA reviewed in its decision—no new evidence may be submitted and no new arguments or issues may be raised. The court will uphold BVA if there is any reasonable basis for its decision, unless the court finds an error of fact or law, or finds that BVA's decision was arbitrary and capricious. Either the appellant or VA may appeal the CAVC's decision to the U.S. Court of Appeals for the Federal Circuit, and if still unsuccessful, to the U.S. Supreme Court.

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Although a claimant is entitled to representation by the representative of his or her choice (including an attorney or claims agent) throughout the entire claim and appeal process, *no fee may be charged* by the attorney, agent, or other representative for such representation until after the AOJ has notified the claimant of a decision denying the claim. At this point, if the claimant submits a Notice of Disagreement to begin appeal of the denial to BVA, he or she may now also enter into a contingency fee agreement with an attorney or claims agent for up to 20% of any retroactive benefits initially payable in the event of a favorable decision by either BVA or, if necessary, the court. This is a change from previous practice, which did not allow for charging of fees until *after* BVA had made a final decision denying the appeal. Public Law 109-461 allows this additional practice beginning in June 2007.

This fee agreement is subject to review for correctness and compliance with the law both by BVA and by the CAVC. If the appellant wins on appeal, the AOJ is responsible for withholding the amount payable to the attorney or other representative from the appellant's initial retroactive award. In no event may the payment for this purpose be withheld from any portion of any other benefits payable for any period after the date of the decision authorizing such award.

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Study Questions:

Using the assigned references and reading materials, answer the following questions:

- 1.** To initiate an appeal of a VA decision (not a contested claim), how long from the date of notice of the decision does a claimant have to file a Notice of Disagreement (N.O.D.)?
 - a.** 60 days
 - b.** Six months
 - c.** One year
 - d.** There is no time limit
- 2.** Are there special requirements for a N.O.D.?
 - a.** It must be in writing, and communicate a desire to appeal the decision.
 - b.** It must contain detailed and specific allegations of errors of fact and/or law in the decision.
 - c.** It must be submitted on a specific form.
 - d.** All of the above
- 3.** Where should a N.O.D. with a denial of fee basis authorization be sent?
 - a.** To the Regional Office having the veteran's claims file.
 - b.** To the VA Medical Center having jurisdiction of the veteran's area of residence.
 - c.** To the Board of Veterans' Appeals.
 - d.** Any of the above.
- 4.** Any adjudicative decision as to eligibility for a VA benefit by any element of the Department of Veterans Affairs may be appealed. (T/F)
- 5.** What constitutes an appeal?
 - a.** A N.O.D., a Statement of the Case, and a substantive appeal.
 - b.** A written N.O.D., a Statement of the Case, and a substantive appeal.
 - c.** A timely filed N.O.D., a Statement of the Case, and a written substantive appeal.
 - d.** A timely filed written N.O.D., a Statement of the Case, and a timely filed written substantive appeal.

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- 6.** A claimant is allowed one personal hearing before BVA during the course of an appeal.
(T/F)
- 7.** After an initial decision has been made on a claim, submission of additional evidence extends the appeal period on the claim. (T/F)
- 8.** An appeal which does not allege specific errors of fact or law may be dismissed by BVA.
(T/F)
- 9.** An appeal from a BVA decision must be filed with the U.S. Court of Appeals for Veterans Claims (CAVC) within:
 - a.** 60 days after the date of the BVA decision.
 - b.** 120 days after the date of the BVA decision.
 - c.** Six months after the date of the BVA decision.
 - d.** One year after the date of the BVA decision.
- 10.** Following receipt of a Statement of the Case on a contested claim, the claimant must return the substantive appeal (VA Form 9) within what time period to complete the appeal?
 - a.** 30 days
 - b.** 60 days
 - c.** The remainder of the one-year appeal period
 - d.** B. or C., whichever is the longer time.
- 11.** When a BVA decision is appealed to the CAVC, the claimant will be given the opportunity to submit any additional evidence desired and to raise any new issues that may have arisen since the BVA made its decision. (T/F)
- 12.** Where should an appeal to CAVC be sent?
 - a.** To the Regional Office having the veteran's claims file.
 - b.** To the Board of Veterans' Appeals.
 - c.** To the Court of Appeals for Veterans Claims.
 - d.** To the Federal Court for the veteran's state.
- 13.** Since VA proceedings are non-adversarial in nature, a claimant may not be represented by an attorney unless and until an appeal is made to CAVC. (T/F)